

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: AR115/2021

In the matter between:

MARCO ROSARIO ACCOLLA

APPLICANT/RESPONDENT

AND

ROSANNE NOELLA NARANDAS

RESPONDENT/APPELLANT

ORDER

- (a) The appeal is upheld with costs.
- (b) The order of the court a *quo* dated 03 June 2020 is set aside and is replaced with the following order:
 - (i) The partnership between the applicant and respondent in terms of which they had acquired the immovable property described as Unit

[....], [....] M[....] Road, Durban is hereby dissolved.

(ii) The parties are directed to obtain an independent market valuation of the property from an estate agent, appointed by the Estate's Agent's Board, within ten (10) days from the date of this order, such valuation will be final and binding on the parties.

(iii) Each party will be entitled to 50% of the market value of the property referred to above.

(iv) The applicant is directed to do all things necessary to pass transfer of his half share of the immovable property referred to in paragraph (i) above to the respondent.

(v) In the event of the applicant failing to comply with paragraph (iv) above, then the sheriff of this court is authorised in his stead to sign all documents to enable the transfer of the applicant's half share in the property to the respondent.

(vi) The costs incurred incidental to the transfer of the property shall be borne by the respondent.

(vii) Upon registration of transfer the respondent is directed to pay to the applicant 50% of the value of the property less the sum of R1.5 million plus interest at the rate of 5.5% calculated from 12 July 2012 to date of registration of transfer.

(viii) Payment of the aforesaid sum by the respondent referred to in paragraph above is to be lodged with the transferring attorneys in the form of a suitable bank guarantee within thirty (30) days of the granting of this order.

(ix) The costs of the application and the counter-application are to be borne by the applicant.

JUDGMENT

Bedderson J (Kruger J et Masipa J concurring)

Introduction

[1] In this judgment the parties for the sake of convenience will be described as they are cited in the main application and the counter-application, namely the applicant and respondent respectively.

[2] The respondent appeals against the order of the court *a quo* dated 03 June 2020. Leave to appeal to the full bench of this Division was granted by the Supreme Court of Appeal on petition.

[3] The central issue in this appeal is whether on the facts the learned Judge in the court *a quo* came to the wrong conclusion.

Common Cause Facts

[4] During 2007 the parties became involved in both a business and romantic relationship. Prior to this they were involved in business in their own right, the applicant being the owner in a night club enterprise and the respondent being the owner of three clothing stores which traded as Ooh-La-La. At some stage prior to 2007 the applicant and the respondent became partners in the night club enterprise referred to above after the respondent purchased the applicant's erstwhile partner's shares in the night club. In 2008 they both formed Noella and Rosario CC, (N & R CC) a close corporation which took over the "Ooh-La- la" clothing stores. Initially they both held 50%

of the members interest in N & R CC until 10 August 2010 when the applicant became the sole member of N & R CC. The manner in which the applicant became the sole member was the subject of litigation between the parties which ultimately resulted in N & R CC being placed into provisional liquidation at the behest of the respondent and an entity by the name of Calvi Trading CC (Calvi).

[5] Calvi initially had as its sole member the respondent's son and after his death the respondent became its sole member. Calvi supplied the stock in trade to N & RCC.

[6] In 2008 the parties jointly purchased the immovable property described as Unit [...], [...] M[...] Road, which forms the subject matter of this appeal.

[7] During 2014 there was an irretrievable breakdown in both the business and romantic relationship between the parties. This resulted in the applicant launching an application in this court in terms of which he sought, inter alia, the dissolution of the partnership (in terms of which they had acquired the property in question) together with an order that the property be sold via public auction and for the proceeds to be divided equally between them.

[8] The application was opposed and the respondent in turn launched a counter- application in terms of which she also sought, inter alia, the dissolution of the partnership together with an order directing the applicant to transfer the property into her name against payment of a loan, together with interest, that she had advanced to the applicant in respect of his half share towards the balance of the purchase price that was paid for the property.

[9] The applicant disputes the existence of this loan and this dispute was referred for the hearing of oral evidence in terms of an order of this court dated 12 November 2015.

[10] At the hearing of oral evidence, the applicant, respondent and a Mr C F Robert, (a financial adviser who provided financial services to both the parties) gave evidence. Mr Robert gave evidence to the effect that he was the financial adviser to both parties and that he had attempted to mediate a settlement of the dispute between the parties which failed.

[11] The applicant in his oral evidence and from the contents of his affidavits essentially contends that no such agreement of loan exists between him and the respondent. He states that the deposit for the property was paid for by N & R CC and that the balance of the purchase price was paid from proceeds generated by N & R CC. In essence he states that although Calvi trading CC was the supplier of goods to N & R CC, the invoices that were issued by Calvi Trading CC were fictitious and the payment certificates that were issued by N & R CC were prepared purely for accounting purposes for both himself and the respondent in order for them to keep track of the cash monies that were paid over to the respondent. The Respondent in turn invested these monies for their benefit. The payment of the balance of the purchase price in the sum of R3 million according to him came from an investment account held in the respondent's name at Investec Bank. He furnishes no independent evidence to support this claim

[12] On being led in respect of the contents of an e-mail dated 4 July 2012 which he addressed to First National Bank wherein he stated inter alia; *"I would prefer to fund the property via Rosanne and pay her the interest monthly, so bad luck to you and FNB"*, he responded by stating that he was frustrated and annoyed with the bank for declining to finance both him and the respondent for the balance of the purchase price.

[13] He also denied that both he and the respondent paid an equal deposit for the property because all payments were made from N & R CC.

[14] Under cross-examination he stated that he had an accounting degree.

He averred that he, at all material times, had the financial resources to pay for his half share of the property. He also stated that the respondent was possessed of financial resources to pay her share for the property and that he partly knew where her money was invested.

[15] Upon being pressed by counsel for the respondent on the contents of his e-mail referred to in paragraph 12 above and that his response contained therein did not make sense in light of his evidence that he was at all material times financially secure to make payment of the balance of the purchase price without the need for obtaining a loan from the bank, he stated that he had merely written this to vent his frustration at the bank and to demonstrate to them that they had lost out on a deal.

[16] The respondent in both her oral evidence and from the contents of her affidavits basically confirms that both she and the applicant were involved in a business and romantic relationship since 2007. She confirmed that her association with the applicant commenced when she had purchased the applicant's partners share in 'The Groove Night Club'. It was during this period that they started a romantic relationship which in turn led to both of them establishing N & R CC under which the Ooh-La-La clothing stores would operate. She further confirmed that Calvi, which originally had her son as its sole member, was established to supply stock to N & R CC. After her son's death she became the sole member of Calvi Trading CC

[17] She confirmed that both she and Calvi Trading were the petitioning creditors in the liquidation of M & R CC which is still subject to an insolvency inquiry. She denied that the money she received on Calvi's behalf from N & R CC belonged to both her and the applicant in terms of some private arrangement. The R3 million that she paid in respect of the balance of the purchase price was from an investment held by her in her personal name with Investec bank. The source of these funds was from the business activities of Calvi. Calvi was a separate and distinct legal entity from N & R CC.

[18] She further stated that originally both she and the applicant were going to apply for a mortgage bond to finance the acquisition of this property. When this did not materialize it was agreed that she would pay the balance of the purchase price from her personal funds held in an investment with Investec Bank. It was also agreed that she would be compensated for the loss that she would have earned on her investment by the applicant having to pay interest on his share of the balance of the purchase price.

[19] Under cross-examination she was taken to task with to regard to the interest she claimed that she was entitled to for paying the applicants half share of the balance of the purchase price. She eventually conceded that the rate of 15.5% per annum that she sought as payment for interest was based upon the advice that she received from her erstwhile advocate.

[20] The learned Judge in the court a *quo* was critical of her evidence not only in regard to the interest rate that she alleged that she was entitled to, but also in regard to the fact that she could not give any details in respect of when and where the loan between the parties had been concluded as well as the manner of repayment. She stated that the respondent's conduct was not in accordance with an experienced businesswoman and hence rejected her version.

[21] On the other hand the learned Judge in the court a *qua* found that the evidence of the applicant was consistent throughout and that his version was probable.

[22] In this court's view the learned Judge failed to take into account the circumstances under which the parties conducted their affairs. It is clear from the evidence that the agreement to acquire the property in question was not a formal and not an arms-length business transaction which was concluded by two independent business persons. It was a loose arrangement concluded between two people who were romantically involved and who also happened to be in business. Had they been independent business persons as aforesaid

then in this court's view one would have expected a formal written agreement being concluded between the parties which in turn would have set out in detail the rights and obligations of the parties and it would have also set out in detail the manner of repayment and the rate of interest, if any, that would be charged on the loan amount.

[23] It is also clear from the documentary evidence that the balance of the purchase price of R3 million rand was paid from funds that were invested in the respondent's name. There is no independent evidence to support the applicant's version that the funds held in the respondent's investment account with Investec were joint funds. More importantly his e-mail dated 04 July 2012 to First National Bank does not support his version and is in contrast with his evidence that he was at all material times financially secure in his own right to have paid his half share without the need for seeking a loan. His explanation that the e-mail was written in frustration is not supported by the contents of the e-mail.

[24] The mere fact that the respondent may have contradicted herself in respect of the interest rate she alleged she was entitled to for the loan, and the mere fact that her version of the terms of the agreement was not formalised in writing has to be viewed against the facts as set out above.

[25] It is trite that an appeal court will not likely interfere with findings of fact made by a trial court. However in *Bernert v Absa Bank Ltd* 2011(3)(SA)92 (CC) at paragraph 106 Ngcobo CJ stated the following:

"The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule...But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings of fact, and come to its own conclusion on the facts as

they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."

[26] In *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) Jafta J said the following in respect of an appellate court's entitlement to interfere with findings of fact:-

"But even in the appeal, the deference afforded to a trial court's credibility finding must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case."

[27] For the reasons referred to above this court is respectfully of the view that the learned Judge misdirected herself in overstating her findings of credibility of the respondent and as a result came to the wrong factual conclusion on the probabilities. The learned Judge's finding that the applicant's version is not only more probable but that it is more reliable and credible than the respondent's version is in this court's view a misdirection on the facts.

[28] In the results the following order is granted:

- (a) The appeal is upheld with costs
- (b) The order of the court *a qua* dated 03 June 2020 is set aside and is replaced with the following order:
 - (i) The partnership between the applicant and respondent in terms of which they had acquired the immovable property described as Unit [...], [...] M[...] Road, Durban is hereby dissolved.

(ii) The parties are directed to obtain an independent market valuation of the property from an estate agent appointed by the Estate's Agent's Board within ten (10) days from the date of this order, such valuation will be final and binding on the parties.

(iii) Each party will be entitled to 50% of the market value of the property referred to above.

(iv) The applicant is directed to do all things necessary to pass transfer of his half share of the immovable property referred to in paragraph (i) above to the respondent.

(v) In the event of the applicant failing to comply with paragraph (iv) above, then the sheriff of this court is authorised in his stead to sign all documents to enable the transfer of the applicant's half share in the property to the respondent.

(vi) The costs incurred incidental to the transfer of the property shall be borne by the respondent.

(vii) Upon registration of transfer the respondent is directed to pay to the applicant 50% of the value of the property less the sum of R1.5 million plus interest at the rate of 5.5% calculated from 12 July 2012 to date of registration of transfer.

(viii) Payment of the aforesaid sum by the respondent referred to in paragraph above is to be lodged with the transferring attorneys in the form of a suitable bank guarantee within thirty (30) days of the granting of this order.

(ix) The costs of the application and the counter-application are to be borne by the applicant.

Bedderson J

I agree

Kruger J

I agree

Masipa J

APPERANCES

Counsel for the appellant
Appellants Attorney

M B Pedersen
M B Pedersen & Associates
Grounnd Floor
No. 10 Sevenfold
10 Derby Place
University Road
Westville
Tel: 031 072 0324
Fax: 068 620 6371
Email: admin@durban-law.co.za
Ref: M B Pedersen

Counsel for the Respondent
Respondents Attorneys

G R Thatcher SC
Pat Naidoo Attorneys
Suite 2A, 2nd Floor LBB House
15 Solstice Road
Umhlanga
Tel: 031 301 1793

Email: pat@pnattorneys.net

Ref: PN/KM/A074

Date of Hearing

17 January 2022

Date of Judgment

8 April 2022